

***Blakely* and Blended Sentencing: A Constitutional Challenge to Sentencing Child “Criminals”**

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“That’s it for them . . . they don’t get another chance.”¹

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¹ Interview with Abigail Johnson, Instructor, Marion Reg’l Juvenile Det. Ctr., in Columbus, Ohio. (Nov. 15, 2008). This quote comes from a conversation with Abigail Johnson, an English instructor at a juvenile detention facility. Johnson works with minors who are serving the juvenile portion of blended sentences, called “Serious Youthful Offenders” in Ohio. This statement was made in reference to juveniles sent to adult detention facilities when the adult portions of their blended sentences are invoked. For more of the interview with Johnson, see *infra* Part II.

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I. INTRODUCTION

What happens when new restrictions on criminal sentencing, defined in *Blakely v. Washington*, collide with the flexible nature of juvenile courts, whose informality does not prevent them from sentencing kids to hard time? The result is a dilemma of constitutional proportion, with potentially rampant Sixth Amendment violations wrongfully sending child “criminals” to adult prisons.

This Note attempts to reconcile two systems that have developed separately—criminal sentencing and juvenile justice. Still, both juvenile and criminal courts are capable of inflicting the same punishment on juveniles through a recent development in quasi-criminal law: the blended sentence. This Note contends that juvenile courts with the authority to sentence minors to adult time must adhere to the *Blakely* prohibition on discretionary judicial findings that enhance statutory maximum sentences and uphold each individual’s right to have all elements of a crime necessary to impose a particular sentence decided by a jury.

A blended sentence is "a sanction that combines delinquency sanctions and criminal punishment."² As juvenile sentencing and criminal sentencing increasingly intersect, several unanswered questions emerge, waiting to be addressed in every state employing a blended sentencing scheme: are blended sentencing schemes bound by *Blakely*? Can a juvenile court judge sentence a minor to adult prison time when the minor has not been afforded the protections due to a criminal defendant? Does a judge's finding that a juvenile will likely not be "rehabilitated" by the delinquency system fall under judicial enhancement of a sentence forbidden by *Blakely*? This Note explores the constitutional implications of blended sentences in light of the Supreme Court's decision in *Blakely* by describing the mechanisms of various blended sentencing schemes, then applying the principles found in *Blakely* to those statutory schemes.

This Note also argues that, if states want to preserve blended sentencing as a constitutional form of juvenile adjudication, juvenile courts that issue blended sentences should look more like criminal courts, with a jury making both the initial finding that the minor should to be tried under this hybrid system, as well as the factual findings necessary to impose adult punishment.³ With conflicting information about the effects of imposing an adult sentence consecutive with the traditional juvenile disposition, the actual rehabilitative advantages of blended sentencing schemes on juvenile delinquents should be questioned.⁴

Further, this Note argues that blended sentencing undermines the rehabilitative purpose of the juvenile justice system. The benefits to individuals and to society in sentencing minors to juvenile sentences and adult prison terms do not outweigh the disadvantages to the system as a whole and the constitutional rights at risk. Ohio's Serious Youthful Offender statutes, recent developments in New Mexico, and the case law currently developing around the treatment of child "criminals," serve as case studies of recent challenges to juvenile justice statutes and illustrate two states' differing interpretations of *Blakely*'s application to imposing adult sentences on children.

While the juvenile justice system marches on virtually unchanged and underdeveloped regarding minors' rights, the law continues to evolve around the rights of criminal defendants and sentencing standards.⁵ Most notably in

² BLACK'S LAW DICTIONARY 1485 (9th ed. 2009).

³ See *infra* Part V.A & C.

⁴ NAT'L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 8 (2008) [hereinafter DIFFERENT FROM ADULTS].

⁵ See generally *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that juveniles do not have the right to a jury under the Sixth or Fourteenth Amendments); *In*

the recent Supreme Court opinion *Blakely v. Washington*, the Court redefined the scope of responsibilities of the judge and the jury in finding the facts necessary to impose a sentence.⁶

Blakely shook the criminal sentencing world in 2004, realigning the role of judicial discretion with the rights of criminal defendants under the Sixth Amendment. The Supreme Court's decision in *Blakely* created new expectations in sentencing when it held that any finding enhancing a sentence beyond the statutory maximum must be made by the jury and cannot be made by the judge.⁷

Part II of this Note gives a general history of the separate treatment of juvenile offenders and adult criminals, including the purposes and goals of the juvenile court, as well as statutory mechanisms for transferring juveniles to criminal court or imposing criminal sentences through blended sentencing. Part III tells the *Blakely* story and explains how *Blakely* and its predecessor case *Apprendi* have been used to challenge sentencing across the country. Part IV gives an overview of blended sentencing schemes in each of the fifteen states with these provisions on their books, and Part V applies *Blakely* to those schemes and challenges the use of judicial fact-finding in the blended sentencing process.

II. WHEN IS A MINOR A MINOR, AND WHEN IS A MINOR AN ADULT?

The Department of Justice, Office of Juvenile Justice and Delinquency Prevention, recently published a report on the rate and causes of juvenile suicide in confinement.⁸ Of all the suicides that occurred in juvenile

re Gault, 387 U.S. 1 (1967) (holding that children must be afforded many, but not all, of the due process rights owed to adults in criminal proceedings); *Kent v. United States*, 383 U.S. 541 (1966) (holding that basic due process rights apply when jurisdiction in juvenile court is waived and the minor is transferred to criminal court). Nearly all significant cases in the area of the rights of minors accused of committing crimes or delinquent acts were decided in the 1960s and 1970s. Children's rights have not evolved in any measurable way since the 1970s.

⁶ 542 U.S. 296, 304 (2004).

⁷ *Id.* at 304.

⁸ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY (2009) [hereinafter SUICIDE IN CONFINEMENT]. By far, the demographic most at risk for self-injurious behavior and juvenile suicide is males between the ages of fifteen and seventeen. *Id.* at 10. Juveniles were in detention less than twelve months, on average, before the suicides occurred. *Id.* at 12. Significant numbers of juveniles had a history of substance abuse. *Id.* at 13. Large percentages of juveniles who committed suicide also had been victims of emotional, physical, and sexual abuse before adjudication and detention. *Id.* at 14. Further, nearly two-thirds of juvenile cases of suicide in confinement coincided with

confinement during the sample period,⁹ most victims were males, non-violent offenders, substance abusers (though none were under the influence of drugs or alcohol at the time of death), and assigned to isolation or single-occupancy living quarters.¹⁰

The report by the Office of Juvenile Justice found "[f]ear of waiver to adult system, transfer to a more secure juvenile facility, or pending undesirable placement" as the most common factor motivating a juvenile's suicide.¹¹

The classification of a minor as a juvenile delinquent or a criminal defendant makes a profound difference on the minor's future. The finding of fear of waiver to the adult system made in the report on juvenile suicides committed in confinement contrasts with the alleged benefits of blended sentences. Proponents of blended sentences claim that serious offenders first have an opportunity to benefit from the services available in the juvenile system, while "juveniles whom the system has failed by not rehabilitating them can be sent to adult prisons to serve a stricter punishment for their crimes, along with those juveniles who are simply not receptive to rehabilitation."¹² The foremost "benefit" of a juvenile blended sentence is that the hybrid sentence protects society while simultaneously creating incentives for minors to be rehabilitated in the juvenile system.¹³

With conflicting information about the effects of imposing adult sentences on juveniles consecutive with a traditional juvenile disposition, the actual rehabilitative advantages of blended sentencing schemes on juvenile delinquents must be questioned. The ease with which the adult portion of the blended sentence can be invoked may create a disincentive for juvenile

instances of mental illness. *Id.* at 15. These issues, amplified by the young age of the sufferers, are what the juvenile court is ideally designed to address.

⁹ The study involved an extensive survey of all facilities that experienced a juvenile suicide between 1995 and 1999. SUICIDE IN CONFINEMENT, *supra* note 8, at 6. One hundred and ten suicides occurred in the sample period, distributed among thirty-eight states. Departments of juvenile corrections, offices of attorneys general, and state medical examiners, as well as various other state agencies, were also involved in the survey. *Id.*

¹⁰ *Id.* at vii–viii.

¹¹ *Id.* at 24. Although only ten cases cited fear of undesirable placement as a precipitating factor to juvenile suicide in confinement, those ten cases account for nine percent of all juvenile suicides. *Id.* Identifying fear of waiver into the juvenile system as a precipitating factor in any juvenile case is indicative of a more widespread fear experienced by incarcerated minors who may be subject to criminal punishment in the immediate future.

¹² Kristin L. Caballero, Note, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders?*, 19 ST. JOHN'S J. LEGAL COMMENT. 379, 417 (2005).

¹³ Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 789, 822 (2002).

facilities and services to work with offenders in the most need of rehabilitative services.¹⁴

The information on the operation, effectiveness, and continuing impact of juvenile sentencing systems on serious juvenile offenders is largely absent or incomplete, giving policy makers and children's advocates no information to assess current blended sentencing systems.¹⁵ The "get tough on crime" movement in the 1980s and 1990s motivated legislation for harsher punishment for younger offenders.¹⁶ To date, there has been little informed analysis of the statistics of how many children are sentenced as adults, how many are exposed to the criminal system via transfer mechanisms or blended sentences, and how many children are serving sentences as criminals.¹⁷

Abigail Johnson, an English teacher from the Marion Regional Juvenile Detention Center in Marion, Ohio, illuminated the ease with which adult sentences are invoked for youths in juvenile detention centers. Ms. Johnson works daily with several juveniles with blended sentences, called serious youthful offenders (SYO) in Ohio. When an incident arises at the juvenile facility, "their SYO is invoked, and they're sent off to prison."¹⁸ After speaking at further length, she expressed a distinct sense of discouragement when a minor's adult sentence is invoked—"it's like that's it for them . . . they don't get another chance."¹⁹

Research on the developmental processes of teenagers cites common psychological characteristics that could be considered mitigating factors in the case of juvenile offenders.²⁰ These include short-sighted decision-

¹⁴ *E.g.*, OHIO REV. CODE ANN. § 2152.14 (West 2009). In order for the director of youth services to initiate the invocation of a serious youthful offender adult sentence, the offender must be at least fourteen years old, in the institutional custody of the department of youth services, and have committed only one act of misconduct while in detention. *Id.*

¹⁵ DIFFERENT FROM ADULTS, *supra* note 4, at 8. This study by the National Center for Juvenile Justice provides a general survey of all fifty states' treatment of juveniles in terms of transfer provisions, waiver provisions, and blended sentencing schemes.

¹⁶ See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 472 (1987).

¹⁷ DIFFERENT FROM ADULTS, *supra* note 4, at 8.

¹⁸ Interview with Abigail Johnson, *supra* note 1. Johnson explained that violations of institutional rules, such as gang affiliation and physical violence, are typical grounds for invoking an adult sentence. *Id.*

¹⁹ *Id.*

²⁰ Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1009-11 (2003). This study was conducted by Steinberg, a psychologist at Temple University, and Scott, a legal scholar at the University of Virginia School of Law. *Id.* at 1009.

making, poor impulse control, vulnerability to peer pressure, and the long brain maturation process that continues beyond age eighteen—the age of majority and the age of termination of jurisdiction in juvenile court.²¹

The historical foundation of the juvenile court was incapable of accounting for all of the social science and scientific data available to legislators and judges today. Part A of this section describes the ideology that inspired the separate treatment of juveniles who commit offenses. Part B explains the mechanisms that undercut this separation and force more juveniles into the criminal system. Part C describes the creation of the blended sentence, an attempted compromise between the urge to “get tough” on juvenile crime and the desire to treat children differently, preserving a limited right to rehabilitation without affording minors the constitutional rights of an adult faced with a criminal sentence.

A. The Juvenile Justice System: A Brief History

In 1899, Illinois enacted the first juvenile court act, validating decades of work by child advocates who fought to remove children from adult prisons and impoverished situations.²² This was a humanitarian victory in the eyes of the “child savers,” whose specialized court system dedicated to the needs of children quickly spread throughout the states.²³ By 1911, twenty-two states enacted similar juvenile court acts, and forty-five states created juvenile courts by 1925.²⁴ The rapid development of a new type of justice system was called “the most remarkable fact in the history of American jurisprudence” by the U.S. Department of Labor, Children’s Bureau in 1933.²⁵ The primary goal of the first juvenile courts was rehabilitation.²⁶ Juvenile courts still hold reform as their ultimate goal, recognizing the special capability of children to change their behavior and successfully rehabilitate their behaviors.

²¹ *Id.* at 1012. If the minor is given a juvenile disposition, the juvenile court maintains jurisdiction until the minor turns twenty-one.

²² DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 1003–04 (3d ed. 2007).

²³ *Id.* at 1004. This “humanitarian victory” is challenged by revisionist historians who view the institution of the juvenile court as a “middle class, conservative and culturally ethnocentric” attack on predominantly lower class migrant and immigrant communities and families. Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 217 (1971); see also ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 3, 139 (2d ed. 1977).

²⁴ ABRAMS & RAMSEY, *supra* note 22, at 1004.

²⁵ BERNARD FLEXNER ET AL., *THE CHILD, THE FAMILY AND THE COURT: A STUDY OF THE ADMINISTRATION OF JUSTICE IN THE FIELD OF DOMESTIC RELATIONS* 12 (1933).

²⁶ Juvenile Court Act of 1899, 1899 ILL. LAWS §§ 131–34.

Historically, the juvenile court's role was to determine the conditions of the minor "physically, mentally, morally, and . . . to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."²⁷ Still today, remaining in juvenile court yields benefits to the minor. While criminal law imposes punitive measures based on the nature of the sentence, a delinquency adjudication in juvenile court should be based on the juvenile's individual condition.²⁸

Following the rapid proliferation of juvenile justice systems, the juvenile courts developed separately from the criminal courts as a means by which children could be rehabilitated and protected from experienced criminals within criminal courts and adult corrections facilities. Despite this virtuous goal, the current reality is that juvenile courts have the statutory capacity to seriously curtail the freedom of minors. The punishments inflicted often make the system look more criminal and punitive than rehabilitative, straining the constitutional and practical limitations of the juvenile court in protecting children who have entered the legal system.

States have developed specific mechanisms for dealing with minors who commit offenses that would be crimes if committed by adults. Minors are "adjudicated," not "tried," in juvenile court, serve time in a rehabilitative juvenile detention center, or face less restrictive "punishment" that involves comprehensive services for the child and the family.²⁹ Procedural informality has been a hallmark of the juvenile system since its inception, with its aim to create "an intimate, friendly relationship . . . between the judge and the child."³⁰

Because the juvenile court is allegedly a kinder, gentler court,³¹ the juvenile court judge should serve as a flexible and creative problem solver,

²⁷ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

²⁸ ABRAMS & RAMSEY, *supra* note 22, at 1005.

²⁹ *Id.* at 1006.

³⁰ Grace Abbott, *A Topical Abstract of State Laws Governing the Trial and Disposition of Juvenile Offenders*, in JUVENILE COURT LAWS IN THE UNITED STATES 119, 129 (Hastings H. Hart ed., 1910).

³¹ Mack, *supra* note 27, at 109. Julian Mack was an early advocate and judicial and social reformer, particularly in the area of juvenile law. His description of a kinder, gentler court has influenced the perception of the court by the judiciary, the legislature, and the juvenile court itself as a place where children are not treated like criminals, but consequently are not afforded the rights of criminal defendants. His explanation of reformation and protection as the goal of the new court has defined juvenile courts for one hundred years:

To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and

with the unique opportunity and responsibility to adapt the treatment given to each child offender to his or her individual needs. The United States Supreme Court has repeatedly held that the juvenile court is not a criminal court; as a result of these holdings, children lack procedural and substantive protections in the relaxed juvenile court.³² In exchange for the benefits and services associated with the juvenile court, children are not afforded the full array of constitutional rights given to criminal defendants.

A child faced with adjudication as a juvenile delinquent occupies a peculiar place in the eyes of the law. Children have no constitutional right to be adjudicated as a juvenile, but statutes in every state create a statutory entitlement to adjudication in courts specialized to deal with delinquency.³³ Commonly, states deny juveniles the right to a trial by jury in exchange for adjudication by a judge with specialized knowledge of the needs of children whose lives intersect with the law.³⁴

Since 1899, the juvenile court has attempted to be a place of rehabilitation without punishment, and so constitutional rights were not even potentially at risk in delinquency proceedings, according to early child advocates.³⁵ The historical focus on a procedure-less, flexible courtroom, where children could be treated individually, has eroded over time, with some critics calling the juvenile court "the bottom of the judicial food chain."³⁶ The increasing criminalization of allegedly "rehabilitative" measures makes the lack of procedure in juvenile court difficult to justify.³⁷

instead of first stigmatizing and then reforming it, to protect it from the stigma, — this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state.

Id.

³² *Kent v. United States*, 383 U.S. 541, 556 (1966).

³³ *Id.* at 556–57. *Kent* made clear that "the Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities," but not the right to a jury. *Id.* The statutory entitlement to be adjudicated in the juvenile court, ideally a protection for the most vulnerable offenders, has been whittled down and truncated in several ways, one of which—blended sentencing—is analyzed through a new constitutional lens, informed by *Blakely*, in this Note.

³⁴ *McKiever v. Pennsylvania*, 403 U.S. 528 (1971).

³⁵ EVELINA BELDEN, *COURTS IN THE UNITED STATES HEARING CHILDREN'S CASES* 7–8 (1920).

³⁶ Patrick T. Murphy, *Helping Parents Choose Wrong*, N.Y. TIMES, June 26, 2000, at A17.

³⁷ See FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY* 105 (2004). Professor Zimring expresses the two modern justifications for the juvenile court system: (1) public consensus that juvenile offenders are different than criminal offenders because of their lack of maturity and culpability; and (2) society's willingness to give juvenile offenders

Another distinction between juvenile proceedings and adult criminal proceedings is confidentiality. Juvenile proceedings are closed to the public, including the media, who generally do not publish the names and addresses of minors.³⁸ Juvenile courts are known and valued for their privacy. Confidentiality is not typical of criminal proceedings, even when a juvenile is involved. Criminal cases are public and often well-publicized. Records of proceedings in juvenile court are sealed, but a criminal record is available to the public.³⁹ The individual benefit and social value of keeping the damage of a public trial from coloring the juvenile's future is lost in an open and public criminal court.

Juvenile proceedings are closed to the public to protect juveniles "from being labeled as criminals."⁴⁰ Children kept under the auspices of the juvenile system are saved from the "embarrassment, shame, stigma, and lasting consequences that often accompanies a public criminal trial."⁴¹ The private nature of juvenile proceedings supports the rehabilitative goal of the juvenile system, making an additional provision to restore the child to society.⁴²

Separate juvenile facilities are another significant benefit to juvenile adjudication.⁴³ Juvenile facilities are exclusively for juveniles; children are isolated from violence and exposure in criminal correctional facilities.⁴⁴ Although multiple studies have found some juvenile facilities in poor conditions, on the whole, juvenile facilities are far less traumatic and dangerous than adult facilities.⁴⁵ The divergent goals of the juvenile system

an opportunity to reform and become a "normal" adult. These justifications notably lack the primary purposes of the criminal justice system—retribution, deterrence, and incapacitation. *Id.*

³⁸ ABRAMS & RAMSEY, *supra* note 22, at 1010.

³⁹ *In re Gault*, 387 U.S. 1, 24–25 (1967).

⁴⁰ Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. Rev. 391, 404 (2001).

⁴¹ Caballero, *supra* note 12, at 410.

⁴² *Id.* at 411.

⁴³ See, e.g., N.Y. CORRECT. LAW § 71(1)(b) (McKinney 2009) (stating that "males under the age of twenty-one at the time sentence is imposed shall not be received at the same correctional facility as males who are over twenty-one at the time sentence is imposed.").

⁴⁴ See, e.g., CONN. GEN. STAT. § 46b-126 (2009); OHIO REV. CODE ANN. § 5120.16 (West 2009); OR. REV. STAT. § 419B.160 (2008).

⁴⁵ Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1045–46 (2005). Abrams describes the Department of Justice's investigation of two state facilities for juveniles—Oakley and Columbia. Even though poor conditions are not uncommon in juvenile facilities, scholars and advocates believe confinement in a juvenile

and the adult correctional system—rehabilitation in the juvenile system versus a stronger emphasis on punishment in the criminal system—make juvenile facilities a better place for an adjudicated minor.⁴⁶ Children may gain access to mental health, educational, recreational, and other rehabilitative services in a juvenile facility or camp, while in adult prison many of these services may not be available at all.⁴⁷

Most importantly, the distinction with the most severe consequences to the child is the range of sentences available in the juvenile and criminal court. Juvenile sentences are limited by statute in length and nature. A juvenile court is limited to sentencing a minor to serve time in a secure juvenile facility, to participate in some other type of rehabilitative program, or to receive services or uphold terms of a probation sentence, until the minor turns twenty-one.⁴⁸ The statutory limitation on the adjudication given to the minor is a "juvenile life term," or commitment until age twenty-one.

Because a minor can receive only a limited sentence in juvenile court, juveniles face much less daunting sentences in juvenile court than if tried and convicted for the same offense in criminal court. The limited nature of juvenile "sentences," more positively and less punitively referred to as adjudications, supports the rehabilitative goal of the juvenile justice system and recognizes the limited capacity and culpability of most juvenile offenders.⁴⁹

A holistic and individualized approach is the traditional argument in favor of a flexible, "kinder, gentler" juvenile court. Problems arise, however, when the informality and flexibility threatens the constitutional rights of the minor, especially when criminal sanctions are a real possibility, as they are in the blended sentencing context.

facility is nearly always favorable to the risks a minor faces in adult prisons. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 234 (1998).

⁴⁶ Susan A. Burns, Comment, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335, 357–58 (1996).

⁴⁷ Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 507–10 (1995).

⁴⁸ Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 895 (1988). A limited number of states extend juvenile jurisdiction to age twenty-five, or until the full juvenile disposition is served. See HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 103 (2006).

⁴⁹ David Yellen, *Foreward: The Enduring Difference of Youth*, 47 U. KAN. L. REV. 995, 996 (1999).

B. Treating Children Like Adults

The national attention garnered by increased violent crime⁵⁰ by juveniles in the late 1980s and early 1990s spurred a movement in nearly every state legislature to “get tough” on crime and create more punitive measures for minors.⁵¹ Predictions were made that a juvenile blood bath would strike the nation by the turn of the century.⁵² Although these predictions proved false, and crime fell consistently after 1994, states created criminal-like mechanisms to treat more children as adults. The disparities between the sentences given to minors in juvenile court and the sentences a juvenile is subject to in criminal court, coupled with the increase in violent crimes committed by juvenile offenders from the mid-1980s to the mid-1990s, resulted in an effective crusade against child “criminals.” During the 1990s, nearly every state changed its juvenile justice laws to create more punitive sentences, expanding the ways to transfer children to adult court and truncating juvenile confidentiality statutes.⁵³ Since the mid-1990s, more children have entered the adult system than ever before.

Most states have created statutes that make it easier to transfer, waive, refer, remand, or certify juveniles for trial and sentencing in criminal court.⁵⁴ Because of these legislative measures, children do not receive the benefits of adjudication in juvenile court. Transfer provisions, as well as “once an adult, always an adult” provisions, are two common entry points to the criminal system.

⁵⁰ Violent crimes are typically defined as murder, manslaughter, forcible rape, robbery, and aggravated assault. FBI, VIOLENT CRIME, http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/index.html.

⁵¹ HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 132 (1999), available at <http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html>. In 1994, the Violent Crime Index arrest rate was sixty-one percent above the 1988 level. *Id.* at 120.

⁵² *E.g.*, Fox Butterfield, *Experts on Crime Warn of a 'Ticking Time Bomb,'* N.Y. TIMES, Jan. 6, 1996, at 6. The New York Times article quoted John J. DiIulio, Jr., author of the popular book *How to Stop the Coming Crime Wave* (1996). DiIulio suggested that the number of violent juvenile offenders, called “superpredators” by DiIulio, would grow with the predicted twenty-three percent increase in the size of the crime-prone demographic—males, age fourteen to seventeen. *Id.*

⁵³ *Id.*

⁵⁴ Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 714.

1. *Transfer into Adult Court*

Three transfer mechanisms open the door for children to the adult criminal system. Generally known as transfer or waiver provisions, these mechanisms are classified by who bears the responsibility to make the decision for placement of the minor for trial or adjudication. The three procedures are judicial waiver, direct file or prosecutorial discretion, and statutory exclusion.⁵⁵

Judicial waiver is the most prevalent statutory device pushing children into criminal court.⁵⁶ Forty-six states currently use judicial waivers. All states prescribe standards for juvenile judges to make their waiver decisions, but the determination is left largely to the judge's discretion. Some courts have presumptive waiver practices for certain offenses or alleged offenders.

The function of direct file provisions, also known as prosecutorial discretion provisions, is self-explanatory:⁵⁷ the prosecutor has the discretion to file proceedings against a minor directly in juvenile or criminal court. There may be limited, statutorily defined cases eligible for direct file.⁵⁸ However, in those specific cases at least, the prosecutor's full discretion determines the youth's processing. Fifteen states have direct file provisions, often in combination with other transfer and waiver mechanisms.⁵⁹

Finally, statutory exclusion creates a predetermined class of circumstances under which the juvenile must be tried in criminal court.⁶⁰

⁵⁵ PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, TRYING AND SENTENCING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER AND BLENDED SENTENCING LAWS 2 (2003).

⁵⁶ See, e.g., GA. CODE ANN. § 15-11-30.2(a) (West 2009); 42 PA. CONS. STAT. ANN. § 6355(a) (West 2009); TEX. FAM. CODE ANN. § 54.02(a) (West 2009). The Georgia statute provides that "the court before hearing the petition on its merits may transfer the offense for prosecution to the appropriate court having jurisdiction of the offense" if minimal conditions are met. GA. CODE ANN. § 15-11-30-2(a). The conditions that make the juvenile eligible for judicial waiver under Georgia law include reasonable grounds to believe the juvenile committed the delinquent act, the child cannot be committed to an institution, and the safety of the community requires the transfer. *Id.* § 15-11-30.2(a)(3)–(4).

⁵⁷ See, e.g., ARK. CODE ANN. § 9-27-318(c); MONT. CODE ANN. § 41-5-206(1) (West 2009).

⁵⁸ See, e.g., MONT. CODE ANN. § 41-5-206(2).

⁵⁹ See, e.g., *Rodriguez v. Commonwealth*, 578 S.E.2d 78, 80–83 (Va. Ct. App. 2003) (holding that a juvenile has no right to a hearing where transfer to criminal court is pursuant to an automatic or prosecutorial discretion statute).

⁶⁰ See, e.g., FLA. STAT. ANN. § 985.556(3) (West 2009). The Florida statute is a typical example of statutory exclusion, or "involuntary mandatory waiver" as this provision defines it. The statute provides in pertinent part:

Twenty-nine states grant original jurisdiction in criminal court over some juveniles. Legislators, rather than prosecutors or judges, determine the appropriate forum for certain juvenile offenders through statutory exclusion mechanisms.

2. “Once an Adult, Always an Adult” Provisions

Thirty-four states currently have “once an adult, always an adult” provisions on their books, in combination with other mechanisms like judicial waiver provisions, prosecutorial discretion provisions, statutory exclusion provisions, and blended sentencing statutes.⁶¹ “Once an adult, always an adult” provisions function as automatic transfer devices.⁶² Typically, the minor must have been convicted in a previous adult criminal proceeding. Some states impose limits on the age of offenders or type of offense eligible for automatic transfer. The most common provision automatically excludes minors from juvenile court adjudication once they have been tried and convicted in criminal court.

Some states may count blended sentences as qualifying convictions that trigger “once an adult, always an adult” treatment. This puts juveniles who receive a blended sentence, yet never serve the adult sanctions, at risk of

(a) If the child was fourteen years of age or older, and if the child has been previously adjudicated delinquent for an act classified as a felony, which adjudication was for the commission of, attempt to commit, or conspiracy to commit murder, sexual battery, armed or strong-armed robbery, carjacking, home-invasion robbery, aggravated battery, aggravated assault, or burglary with an assault or battery, and the child is currently charged with a second or subsequent violent crime against a person; or (b) If the child was fourteen years of age or older at the time of commission of a fourth or subsequent alleged felony offense and the child was previously adjudicated delinquent or had adjudication withheld for or was found to have committed, or to have attempted or conspired to commit, three offenses that are felony offenses if committed by an adult, and one or more of such felony offenses involved the use or possession of a firearm or violence against a person; the state attorney shall request the court to transfer and certify the child for prosecution as an adult . . . the court shall either enter an order transferring the case or submit written reasons for its refusal to transfer the case.

Id.

⁶¹ DIFFERENT FROM ADULTS, *supra* note 4, at 2.

⁶² *E.g.*, ALA. CODE § 12-15-34.1 (West 2009); FLA. STAT. ANN. § 985.556 (West 2009); IDAHO CODE ANN. § 20-509 (2009); N.H. REV. STAT. ANN. § 169-B:27 (2009).

The Idaho statute is a clear example of a “once an adult, always an adult” provision. It provides that “[o]nce a juvenile has been formally charged or indicted pursuant to this section or has been transferred for criminal prosecution as an adult pursuant to the waiver provisions of section 20-508, Idaho Code, or this section, the juvenile shall be held in a county jail or other adult prison facility unless the court, after finding good cause, orders otherwise.” IDAHO CODE ANN. § 20-509(2) (2009).

being tried in criminal court for later offenses, regardless of the severity of the offense or the juvenile's amenability to treatment.

States can use any number of combinations of these statutory options for trying and sentencing juveniles as adults in criminal court. Nevertheless, the next section discusses a new hybrid juvenile/criminal creation—the blended sentence—that attempts to appease all interested parties in processing juvenile offenders.

C. Blended Sentencing: When Children Are Treated Like Both Minors and Adults

The fifteen states that employ "juvenile blend" statutory schemes effectively enhance the sentencing authority of the juvenile court judge beyond the jurisdiction of the juvenile court.⁶³ A juvenile blended sentence allows the juvenile court to impose both a juvenile disposition and a stayed adult sentence. Juvenile blended sentencing laws attempt to "guarantee[] . . . good behavior" of sentenced juveniles, with the assumption that minors will never serve the adult sentence.⁶⁴

The juvenile blended sentence not only arguably violates the minor's constitutional rights;⁶⁵ it also increases the overall risk that juvenile offenders will be sentenced as adults if they commit another offense before the age of eighteen.⁶⁶ With "once an adult, always an adult" provisions fast-tracking any juvenile who has previously been processed in the "adult" system, even limited exposure to the criminal system through a juvenile blended sentence makes it more likely, and potentially mandatory, that the minor will be tried as a criminal in adult court if he or she comes into contact with the system again.

State-specific blended sentencing positions are discussed in more detail in Part III below.

⁶³ DIFFERENT FROM ADULTS, *supra* note 4, at 5. Another variety of blended sentencing include the criminal blended sentencing scheme, where the criminal court has the authority to sentence the minor to a juvenile disposition and a stayed adult sentence. *Id.* Criminal blended sentencing schemes do not carry the constitutional risks and burdens of juvenile blended sentencing schemes because the minor receives all the protections and rights of a criminal defendant.

⁶⁴ *Id.*

⁶⁵ See *infra* Part V.A.

⁶⁶ DIFFERENT FROM ADULTS, *supra* note 4, at 5.

III. THE MECHANICS OF *BLAKELY*

Blakely v. Washington, decided in 2004, created a ongoing stir in the sentencing world. Former Justice Sandra Day O'Connor immediately recognized the impact of the case, describing the decision as a "Number 10 earthquake."⁶⁷

The *Blakely* saga began with an earlier decision, *Apprendi v. New Jersey*,⁶⁸ decided four years before *Blakely*. The Supreme Court set out what seemed to be a clear rule in *Apprendi*—any fact which increases the penalty for a crime beyond the statutorily prescribed maximum must be admitted by the defendant or found by the jury.⁶⁹ The judge may not find facts that increase a sentence beyond the statutory maximum.⁷⁰ The jury must find that any penalty-increasing facts have been proved beyond a reasonable doubt.⁷¹

The Supreme Court addressed this sentencing problem again in *Blakely*. The opinion authored by Justice Scalia interpreted the term "statutory maximum," a key component of the *Apprendi* decision. According to *Blakely*, the term "statutory maximum" in the context of *Apprendi* means the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."⁷²

The Court made clear that

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but *the maximum he may impose without any additional findings*. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and *the judge exceeds his proper authority*.⁷³

Justice Scalia referenced the basic tenets of common law criminal jurisprudence, holding that the *Blakely* rule reflects the principle "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and

⁶⁷ Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-Blakely Era*, 4 OHIO ST. J. OF CRIM. L. 27, 27 (2006).

⁶⁸ 530 U.S. 466 (2000).

⁶⁹ *Id.* at 490. Enhancements based on prior convictions are the sole exception to the *Apprendi* rule.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Blakely v. Washington*, 542 U.S. 296, 303 (2003).

⁷³ *Id.* at 303–04 (emphasis added) (citation omitted).

neighbours,”⁷⁴ and that “an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.”⁷⁵

The defendant in *Blakely* pled guilty to a Class B felony, with a fifty-three-month statutory maximum punishment, set by the State of Washington Sentencing Grid.⁷⁶ However, *Blakely*’s sentence was increased by more than three years when the presiding judge found that the crime had been committed with “deliberate cruelty.”⁷⁷ Herein lies the *Apprendi* violation, the discrepancy that led the Supreme Court to clarify and reinforce the basic protections and rights of the Sixth Amendment in *Apprendi* and *Blakely*. The Supreme Court found that the facts supporting the finding that the defendant acted with “deliberate cruelty” were neither admitted by *Blakely*, nor determined by the jury; the “deliberate cruelty” factor necessary for enhancement was improperly found by the judge alone.⁷⁸

Blakely holds that a judge exceeds his or her proper authority when a sentence is not solely supported by the jury’s verdict—that is, when the jury has not found all the facts “which the law makes essential to the punishment.”⁷⁹ *Blakely* underscores the *Apprendi* holding and clearly limits the authority of the judge in criminal sentencing decisions.

Since the *Blakely* decision, the Supreme Court has heard a series of cases on the application of *Blakely* to nuances in criminal proceedings, continuing to focus on the jury’s role in deciding facts dispositive to sentencing outcomes.⁸⁰ *Shepard v. United States* held that the judge’s review of prior convictions for the purpose of sentence enhancement is limited to charging documents, plea agreements, and the defendant’s admissions in court.⁸¹

⁷⁴ *Id.* at 301 (citing 4 W. BLACKSTONE, COMMENTARIES 343 (1769)).

⁷⁵ *Id.* at 301–02 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872)).

⁷⁶ *Id.* at 321 (O’Connor, J., dissenting). Justice O’Connor recognized the immediate damage the *Blakely* decision would do to state sentencing guidelines and grids, like the Sentencing Grid used in Washington. *Id.* at 314–15. The United States Congress also recognized the immediate impact of *Blakely* on the federal sentencing guidelines and practices. See *Blakely v. Washington and the Future of the Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 2 (2004).

⁷⁷ *Blakely*, 542 U.S. at 298, 303.

⁷⁸ *Id.* at 303–04.

⁷⁹ *Id.* at 304 (quoting J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1969)).

⁸⁰ Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1322 (2007).

⁸¹ *Shepard v. United States*, 544 U.S. 13, 16 (2005). The defendant in *Shepard* pled guilty to burglary, but the government, in prosecuting *Shepard*, attempted to introduce evidence beyond the admissions made in the guilty plea. *Id.* The Court held that the sentencing court could not look to police reports or complaint applications to determine

Another *Blakely* case, *Washington v. Racuenco*, states that “sentencing factors, like elements, [are] facts that have to be tried to the jury and proved beyond a reasonable doubt.”⁸² Finally, in *Cunningham v. California*, the Court made clear that any judicial fact-finding raises constitutional issues, and any fact that elevates a sentence beyond the statutory maximum allowed by a finding of guilt or a guilty plea must be found by the jury.⁸³ The Supreme Court has examined multiple points of fact-finding during the trial and sentencing processes.⁸⁴ With each *Blakely* development comes the reactive adjustment to sentencing practices by prosecutors, legislators, and sentencing commissions.⁸⁵

The Supreme Court has not yet decided a case involving the consequences of *Blakely* on adult sentences given in juvenile court by juvenile court judges, whose “sentencing” capacity is limited to imposing juvenile life terms. A *Blakely* issue is apparent, however, when a judge makes a specific finding of fact that enhances a sentence beyond the statutory maximum, regardless of whether the finding is made by the trial court judge in a criminal proceeding or by a juvenile court judge in a hybrid criminal-juvenile proceeding.⁸⁶

IV. BLENDED SENTENCING: STATUTORY SCHEMES STATE-BY-STATE

Blended sentencing is utilized by the states as a way to impose criminal sanctions upon children without “having to resort to the cumbersome [transfer] process.”⁸⁷ For example, Ohio has actively used its blended

the “character” of the burglary, and thereby authorize a sentence longer than that authorized by the guilty plea. *Id.*

⁸² *Washington v. Racuenco*, 548 U.S. 212, 220 (2006) (holding that in limited circumstances *Blakely* error may be harmless). Defendant in *Racuenco* was given a three-year firearm enhancement, without the fact that the crime was committed with a firearm being submitted to a jury.

⁸³ *Cunningham v. California*, 549 U.S. 270, 288–89 (2007) (holding California’s determinate sentencing law, which places the authority to find sentence-enhancing facts with the judge and not the jury, invalid under *Blakely*).

⁸⁴ Appleman, *supra* note 80, at 1311–12 (noting the Supreme Court’s “re-discovering” of the accused’s Sixth Amendment rights: the defendant must be found guilty by a jury of all elements of the crime.).

⁸⁵ See Richard S. Frase, *The Apprendi-Blakely Cases: Sentencing Reform Counter Revolution?*, 6 CRIMINOLOGY & PUB. POL’Y 403 (2007).

⁸⁶ For further discussion, see *infra* Part V.A.

⁸⁷ *E.g.*, RODERICK L. IRELAND, 44 MASSACHUSETTS PRACTICE SERIES: JUVENILE LAW § 2 (2d ed. 2008). Judge Ireland views the comprehensive changes made by the Massachusetts Legislature as an attempt to rectify the perceived “societal issue of juvenile violence.” *Id.* Blended sentencing schemes, as well as other statutory

sentencing process in lieu of transfer for several years. From the time the Ohio serious youthful offender provision became effective on January 1, 2002, 231 juveniles have been adjudicated as serious youthful offenders.⁸⁸ As of January 31, 2009, sixteen of the 231 serious youthful offenders are on parole, sixty-three are currently in juvenile institutions, and 152 have been "discharged."⁸⁹ In the Ohio Department of Youth Services data-keeping system, "discharged" simply refers to juveniles who are no longer committed to a juvenile institution. The Department of Youth Services keeps data on the number of SYOs currently in the juvenile system and under the supervision of a juvenile probation officer, but the Department does not know how many "discharged" juveniles are released and how many are transferred to an adult facility to serve the adult portion of their blended sentence.

Statutes that give minors a blended juvenile disposition and adult sentence in juvenile court can be categorized in two ways: mandatory blended sentencing schemes, or discretionary blended sentencing schemes. The details of each state's statutory structure are discussed below.

A. *Mandatory Blended Sentences*

Several states have created mandatory blended sentencing schemes, which provide that when the juvenile and the offense meet certain statutory conditions, the proceeding is designated as one in which a blended sentence

mechanisms that make children eligible for criminal sentences, are "designed to ensure that violent juvenile offenders . . . *cannot* avail themselves of the same protections traditionally afforded to delinquent children in the Commonwealth." *Id.* (emphasis added).

⁸⁸ Interview with the Office of Policy, Legislation, and Educ., Ohio Dep't of Youth Servs. Statistics (Mar. 10, 2009). The average daily institutional population of the Department of Youth Services was 1709 juveniles in 2006, down from 2101 juveniles ten years earlier in 1996. Average DYS Inst. Populations by Fiscal Year, Ohio Dep't of Youth Servs., *Statistics*, <http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=nX3ktHYTIuQ%3d&tabid=117>. The average daily parole population in 2006 was 1566, down from 2673 ten years earlier in 1996. *Id.* In Ohio, serious youthful offenders are predominantly sixteen- and seventeen-year-olds. Of the 231 serious youthful offenders adjudicated in the last seven years, twenty-seven were under the age of fifteen and a half, with only fifteen of those twenty-seven under the age of fourteen. This is not an unusual discrepancy in the ages of juvenile offenders for the Department of Youth Services, which deals with mostly older minors in ordinary juvenile adjudications. Interview with the Office of Policy, Legislation, and Educ., *supra*.

⁸⁹ Interview with the Office of Policy, Legislation, and Educ., *supra* note 88. The number of serious youthful offenders is small in comparison to the total number of juveniles in the Department of Youth Services, but it is by no means insignificant. The unknown number of serious youthful offenders serving sentences in adult facilities is particularly troublesome.

may be given. Upon a plea or finding of guilt in a mandatory blended sentence jurisdiction, the judge must impose a juvenile disposition and a stayed adult term.

1. *Alaska*

Alaska's blended sentencing scheme is known as "dual sentencing."⁹⁰ The Alaska Division of Juvenile Justice refers the juvenile case to the district attorney to process. The department may make the referral if two conditions are met: (1) the minor must have been sixteen or older when the offense was committed; and (2) either the offense is a felony against a person and the minor was previously adjudicated for an equivalent offense, or the offense is sexual abuse of a minor.⁹¹ If these conditions are met, the district attorney may elect to seek the imposition of a dual sentence.⁹²

The district attorney may seek a dual sentence if the sentence would further the goals and purposes of the juvenile delinquency chapter of the Alaska Code. Specific purposes of Alaska's juvenile delinquency system include prevention of repeated criminal behavior, restoration of the community and victim, protection of the public, and development of the juvenile into a productive citizen.⁹³

⁹⁰ ALASKA STAT. § 47.12.065 (2009).

⁹¹ *Id.* § 47.12.065(a)(1)–(2).

⁹² *Id.* § 47.12.065(b).

⁹³ The goal of the juvenile system is "to promote a balanced juvenile justice system in the state to protect the community, impose accountability for violations of law, and equip juvenile offenders with the skills needed to live responsibly and productively." *Id.* § 47.12.010(b)(1)(A)–(D). This provision goes on to list thirteen more purposes, including to protect citizens from juvenile crime; to hold juvenile offenders accountable for their conduct; to provide swift and consistent consequences; to make the juvenile justice system more open, accessible, and accountable to the public; to require parental or guardian participation; to create an expectation that parents will be held responsible for the conduct of their children; to ensure that victims and all other interested parties are treated with dignity and respect throughout all legal proceedings; to provide due process to assure fair legal proceedings during which constitutional and other legal rights are recognized and enforced; to divert juveniles from the formal juvenile justice process; to provide an early, individualized assessment and action plan for each juvenile offender; to ensure that victims and witnesses of crimes committed by juveniles are afforded the same rights as victims and witnesses of crimes committed by adults; and to encourage and provide opportunities for local communities and groups to play an active role in the juvenile justice process. *Id.* § 47.12.010(b)(2)–(14).

Juveniles subject to a dual sentencing petition must be indicted by a grand jury.⁹⁴ If the grand jury returns an indictment, the juvenile is given the rights "to have a parent or guardian present at the interview; to remain silent; to have retained or appointed counsel at all stages of the proceedings, including the initial interview; . . . to have an adjudication hearing before a judge or jury . . . ; and the opportunity to confront and cross-examine witnesses."⁹⁵ All juveniles are entitled to a jury trial under Alaska law.⁹⁶ The petition concerning the potentially stayed adult sentence is made by the district attorney before the case is brought to court. The judge has no input as to whether a dual sentence is appropriate; it is beyond the scope of his or her statutory authority.

The Alaska judiciary has addressed one *Blakely* issue in its dual sentencing scheme. In *Greist v. State*, the Alaska court ruled that because a juvenile has the right to demand that a delinquency petition be proved beyond a reasonable doubt to a jury, a delinquency adjudication qualifies as a prior conviction for *Blakely* purposes.⁹⁷ In a subsequent case, the court of appeals stated in dicta that "a juvenile adjudication in Alaska contains the hallmarks that satisfy *Blakely*—the right to a jury trial and the State's burden to prove the delinquency petition beyond a reasonable doubt."⁹⁸ The Alaska Court of Appeals seems to be a correct application of *Blakely* when it held that the dual system satisfies *Blakely*, because no discretionary judicial fact-finding function triggers an extended adult sentence, and the judge need not make any additional findings during the process.⁹⁹

2. Colorado

Colorado's Children's Code labels minors subject to its blended sentencing scheme "aggravated juvenile offenders."¹⁰⁰ The Code specifies conditions which, if satisfied, require adjudication as an aggravated juvenile offender. Felonies, crimes of violence, and felonious unlawful sexual

⁹⁴ *Id.* § 47.12.065(b).

⁹⁵ ALASKA STAT. § 47.12.040(a)(1) (2009).

⁹⁶ *I.J. v. State*, 182 P.3d 643 (Alaska Ct. App. 2008) (holding that any alleged delinquent conduct that is based on behavior that would be criminal if committed by an adult affords the juvenile the right to a jury trial); see also Linda Szymanski, *Juvenile Delinquents' Right to a Jury Trial*, 13 NAT'L CTR. FOR JUV. JUST. SNAPSHOT, No. 2 (2008).

⁹⁷ 121 P.3d 811 (2005).

⁹⁸ *Moore v. State*, 174 P.3d 770, 771 (Alaska Ct. App. 2008).

⁹⁹ For further discussion of the application of *Blakely* to blended sentencing schemes, see *infra* Part V.A.

¹⁰⁰ COLO. REV. STAT. ANN. § 19-2-601 (West 2009).

behavior and incest mandate aggravated juvenile offender proceedings.¹⁰¹ The juvenile is required to admit or deny any previous adjudications or probation revocations at his or her first appearance before the court.¹⁰² The minor may file a written request for a twelve-person jury,¹⁰³ and upon the jury's findings that the juvenile has committed the delinquent acts that are "the subject of the petition alleging that the juvenile is an aggravated juvenile offender, the court may enter any sentence authorized" by statute.¹⁰⁴

The juvenile court is authorized to impose certain determinate sentences for specific crimes; for example, the juvenile may be sentenced a total of three to seven years for a class one felony.¹⁰⁵ When the youth turns eighteen, he or she may be certified by the Department of Human Services to no longer benefit from its programs. If such a determination is made, then upon court order, the juvenile is transferred to the Department of Corrections to serve the remainder of the single determinate sentence issued.¹⁰⁶

3. *Kansas*

Kansas's blended sentencing provision is labeled extended jurisdiction juvenile (EJJ) prosecution.¹⁰⁷ The court makes the EJJ designation based on objective statutory factors. The juvenile must be fourteen- to seventeen-years-old and charged with an offense of specific severity or class, or the juvenile must be charged with a felony after having been adjudicated in past separate juvenile proceedings.¹⁰⁸ The juvenile has the opportunity to rebut

¹⁰¹ *Id.* § 19-2-516(4)(a).

¹⁰² *Id.* § 19-2-601(2)(b).

¹⁰³ *Id.* § 19-2-601(3)(a).

¹⁰⁴ *Id.* § 19-2-601(4)(a).

¹⁰⁵ *Id.* § 19-2-601(5)(a)(I)(C). A single sentence is given, and the youth is committed to a juvenile institution. When the juvenile turns eighteen, the court determines that she will either remain in the juvenile system until age twenty-one (or until the end of her sentence), or she will be transferred to an adult facility.

¹⁰⁶ COLO. REV. STAT. ANN. § 19-2-601(5)(b)(I) (West 2009). The court must find by a preponderance of the evidence that the minor is no longer benefiting from services provided. *Id.* § 19-2-601(5)(b)(III).

¹⁰⁷ KAN. STAT. ANN. § 38-2347 (2009). The Kansas Juvenile Justice Code combines prosecution as an adult and extended jurisdiction juvenile prosecution in this provision.

¹⁰⁸ *Id.* § 38-2347(a)(4). The following specific factors make the juvenile eligible for EJJ designation:

[T]he juvenile was 14, 15, 16 or 17 years of age at the time of the offense or offenses alleged in the complaint and:(A) charged with an offense: (i) If committed by an adult, would constitute an off-grid crime, a person felony, a nondrug severity level 1 through 6 felony or any drug severity level 1, 2 or 3 felony; or (ii) was

the EJJ designation, and the burden is on the prosecutor to prove, by a preponderance of the evidence, that the juvenile proceedings should be designated as EJJ. The juvenile has the right to trial by jury and all other rights of a criminal defendant.¹⁰⁹ If convicted, the juvenile receives any available juvenile disposition and a mandatory stayed adult sentence.¹¹⁰

4. Texas

Texas's violent and habitual offenders have the right to a grand jury that finds both probable cause and the facts concerning the case.¹¹¹ The violent or habitual offender statutes include an exclusive list of offenses eligible for referral to a grand jury.¹¹² The prosecutor makes the decision to refer the case to the grand jury, but the jury must approve the prosecutor's petition.¹¹³ The Texas system is unlike most prosecutorial petition processes, which give the judge the discretion to classify the proceedings as extended juvenile jurisdiction proceedings. Upon a plea or finding of guilt, the juvenile receives one sentence which is served with the Texas Youth Commission (TYC) until a review hearing when the juvenile is between the ages of sixteen and nineteen.¹¹⁴ At the review hearing, the judge may order the juvenile returned to TYC for the remainder of the juvenile term, or the judge may transfer the juvenile to the Department of Criminal Justice to complete the original sentence.

committed while in possession of a firearm; or (B) charged with a felony or with more than, one offense, one or more of which constitutes a felony, after having been adjudicated or convicted in a separate juvenile proceeding as having committed an act which would constitute a felony if committed by an adult and the adjudications or convictions occurred prior to the date of the commission of the new offense charged.

Id.

¹⁰⁹ *Id.* § 38-2347(f)(4).

¹¹⁰ *Id.* § 38-2347(h).

¹¹¹ TEX. FAM. CODE ANN. § 53.045(a)–(c) (Vernon 2009).

¹¹² *Id.* § 53.045(a)(1)–(17). These offenses include murder, manslaughter, kidnapping, aggravated assault, sexual assault, aggravated robbery, injury to a child, an elderly individual, or a disabled individual, certain offenses involving controlled substances, criminal solicitation, indecency with a child, criminal solicitation of a minor, criminal attempt or murder, arson, intoxication manslaughter, and criminal conspiracy.

¹¹³ *Id.* § 53.045(a).

¹¹⁴ Patrick Griffin, *Texas Transfer Provisions*, State Juvenile Justice Profiles, National Center for Juvenile Justice, available at <http://www.ncjj.org/stateprofiles/asp/transfer.asp?topic=Transfer&state=TX06.asp&print=no> (Sept. 23, 2009).

B. *Discretionary Blended Sentences*

Discretionary blended sentencing schemes are provisions that give the juvenile court judge the discretion to determine the juvenile's eligibility for a blended sentence, either pre- or post-trial. At first glance, some of these sentencing schemes look like mandatory blended sentences because they require the judge to impose a stayed adult term upon a plea or finding of guilt. However, the statutes discussed below differ from mandatory blended sentences because they give the juvenile court judge the discretion to certify the proceedings at the outset as extended juvenile jurisdiction or serious youthful offender proceedings. Shifting the judge's discretionary finding from post-trial to pre-trial does not remedy the discretionary nature of the judge's findings.

1. *Arkansas*

Arkansas's extended jurisdiction juvenile offender provision requires the state to prove to the juvenile court judge that an adult sentence is appropriate and the public safety requires the adult portion of the sentence.¹¹⁵ The state has the discretion to file for extended jurisdiction if certain conditions are met.¹¹⁶ These conditions take into account the age of the offender and the seriousness of the crime. The juvenile court must then hold a "designation hearing" where it makes written findings that designate the juvenile an EJJ offender after consideration of nine specific statutory factors and "any other factors deemed relevant by the court."¹¹⁷

¹¹⁵ ARK. CODE ANN. § 9-27-503 (West 2009).

¹¹⁶ *Id.* § 9-27-501.

¹¹⁷ *Id.* § 9-27-503. The factors that the judge must consider are enumerated in § 9-27-503(c)(1)–(10) of the Arkansas Code. The factors include: (1) the seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender; (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted; (4) the culpability of the juvenile, including the level of planning and participation in the alleged offense; (5) the previous history of the juvenile, including whether the juvenile had been adjudicated delinquent and, if so, whether the offenses were against persons or property and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication and maturity of the juvenile, as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult; (7) whether there are facilities or programs available to the court that are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction; (8) whether the juvenile acted alone or was part of a group in the commission of the alleged offense; (9) written reports and other

After the juvenile court judge determines the minor is eligible for extended jurisdiction, the minor must be informed of his or her rights, and the parties proceed to adjudication.¹¹⁸ The minor has the right to a jury trial, but the right may be waived after the minor consults with an attorney.¹¹⁹ The juvenile also has the right to a speedy trial.¹²⁰ If the jury finds the juvenile "guilty" beyond a reasonable doubt, the judge must impose an order for any range of juvenile dispositions and a stayed adult sentence.¹²¹

2. Connecticut

Connecticut's code contains a serious juvenile repeat offender provision, in addition to a serious juvenile sexual offender provision.¹²² If the juvenile is over fourteen-years-old and satisfies the statutory prerequisites,¹²³ the prosecutor may request that a proceeding be designated a serious juvenile repeat offender prosecution, at which point the court holds a hearing to determine whether the designation will in fact be made.¹²⁴ The juvenile judge must find by clear and convincing evidence that the designation will serve the public safety.¹²⁵

The juvenile may waive the right to a jury. If the juvenile waives his right to a jury, the case stays in juvenile court.¹²⁶ Otherwise, the case is transferred to criminal court. If the minor is convicted or pleads guilty in juvenile court, the court must sentence the minor to a juvenile disposition and a stayed adult sentence.¹²⁷

materials relating to the juvenile's mental, physical, educational, and social history; and (10) any other factors deemed relevant by the court.

¹¹⁸ *Id.* § 9-27-503(d).

¹¹⁹ *Id.* § 9-27-505(c)(1).

¹²⁰ *Id.* § 9-27-505(e).

¹²¹ ARK. CODE ANN. § 9-27-507 (West 2009).

¹²² CONN. GEN. STAT. ANN. § 46b-133c (West 2009).

¹²³ *Id.* § 46b-120(14).

¹²⁴ *Id.* § 46b-133c(a)-(b).

¹²⁵ *Id.*

¹²⁶ *Id.* § 46b-133c(c); see also PATRICK GRIFFIN, NAT'L CTR. FOR JUV. JUST., STATE JUVENILE JUSTICE PROFILES: CONNECTICUT TRANSFER PROVISIONS, <http://www.ncjj.org/stateprofiles/asp/transfer.asp?topic=Transfer&state=CT06.asp>.

¹²⁷ CONN. GEN. STAT. ANN. § 46b-133c(c) (West 2009).

3. *Massachusetts*

Massachusetts gives prosecutors the option of proceeding on delinquency charges or youthful offender charges, the latter being the Commonwealth's version of juvenile blended sentencing.¹²⁸ A youthful offender must be between the ages of fourteen and seventeen and must have committed an offense which, if he or she were an adult, would be punishable by imprisonment in state prison. The juvenile must also have been previously committed to the Department of Youth Services, or must have committed a crime of serious bodily injury, an offense involving a dangerous weapon, or a violation of other firearms statutes.

Although all juveniles are entitled to a jury trial under Massachusetts law upon appeal to the Superior Court,¹²⁹ the juvenile court makes the sentencing recommendation based on any relevant factors regarding the "present and long-term public safety."¹³⁰ The juvenile court judge has the discretion to sentence the juvenile to any "sentence provided by law,"¹³¹ "a combination sentence"¹³² (i.e., the traditional blended sentence), or commitment to the Department of Youth Services for a juvenile life term.¹³³

4. *Michigan*

Under Michigan's blended sentencing provision, any offense eligible for direct file in criminal court under the probate code is also alternatively eligible for a blended sentencing proceeding.¹³⁴ The court in its discretion determines whether the "best interests of the public" are served by imposing

¹²⁸ MASS. GEN. LAWS ANN. ch. 119, § 58 (West 2009).

¹²⁹ *Commonwealth v. Thomas*, 269 N.E.2d 277 (Mass. 1971); *see also* Szymanski, *supra* note 96, No. 2.

¹³⁰ MASS. GEN. LAWS ANN. ch. 119, § 58(c) (West 2009). The factors the court must consider include: "the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct," as well as any other factors the court deems relevant. *Id.*

¹³¹ *Id.* ch. 119, § 58(a). A "sentence provided by law" is an adult criminal sentence.

¹³² *Id.* ch. 119, § 58(b). The aggregate sentence cannot exceed the maximum adult sentence provided by law.

¹³³ *Id.* ch. 119, § 58(c).

¹³⁴ MICH. COMP. LAWS ANN. § 712A.18 (West 2009).

a juvenile sentence, an adult sentence, or a blended sentence.¹³⁵ The court must take into account statutorily prescribed factors before imposing any sentence, including the juvenile's culpability, the seriousness "in terms of community protection," and the youth's prior record of delinquency.¹³⁶ The ultimate sentencing decision is left to judicial discretion.

5. Minnesota

Minnesota's extended jurisdiction juvenile prosecution provides for a blended sentence of a juvenile disposition and a stayed criminal sentence.¹³⁷ Any juvenile who is at least fourteen-years-old and who is accused of committing a felony is eligible for his or her adjudication to be certified as an EJJ prosecution. The prosecutor petitions for EJJ certification, and the court must find that clear and convincing evidence proves that the EJJ certification serves the public safety. The juvenile has the right to a jury trial, and upon a plea or finding of guilt, the court must impose a juvenile disposition and a stayed adult sentence. The stayed sentence may be invoked if the juvenile court makes written findings that the conditions of the juvenile disposition were violated, the violations were intentional or inexcusable, and the need for invoking the criminal sentence outweighs any further probation.

Part of the Minnesota blended sentencing scheme was found unconstitutional, but not on *Blakely* grounds. Two Minnesota cases, *In re Welfare of T.C.J.*¹³⁸ and *State v. Garcia*,¹³⁹ found that certain stayed adult sentences violated juveniles' equal protection rights. The blended sentencing statute, viewed as a political and judicial compromise, was invalidated in part. The court held that the portion of the statute precluding stayed adult sentences only for juveniles who arrive in EJJ court through the state's EJJ designation, while not precluding stayed adult sentences for juveniles who arrived in EJJ court through the state's unsuccessful pursuit of prosecution as an adult violated juveniles' equal protection rights.¹⁴⁰ The Minnesota court found "no rational basis linking this classification to the underlying purpose of the statute, which provides the juvenile courts with a means to retain jurisdiction to try juveniles for adult crimes and thus serve public safety."¹⁴¹ There was no justification for sentencing identically situated juveniles based

¹³⁵ *Id.* § 712A.18(m).

¹³⁶ *Id.* § 712A.18(m)(i)–(vi).

¹³⁷ MINN. STAT. ANN. § 260B.130 (West 2009).

¹³⁸ 689 N.W.2d 787, 796 (Minn. Ct. App. 2004).

¹³⁹ 683 N.W.2d 294, 301 (Minn. 2004).

¹⁴⁰ *In re Welfare of T.C.J.*, 689 N.W.2d at 796.

¹⁴¹ *Id.*

on an arbitrary and discretionary distinction.¹⁴² Regardless of these rulings, the major components of Minnesota's EJJ prosecution remain intact. Nevertheless, these cases show that the use of judicial or prosecutorial discretion through the blended sentencing process place the statutory schemes at risk to constitutional challenges.

6. *Montana*

Montana also has an extended jurisdiction juvenile prosecution statute.¹⁴³ All juveniles are entitled to a jury trial under Montana law.¹⁴⁴ Montana provides for a similar prosecutor-initiated certification process, in which the juvenile court judge decides, in his or her discretion, to designate the proceeding as an EJJ prosecution. Upon a plea or finding of guilty, the court must impose the blended sentence, which includes any criminal sentence "permissible if the offender were an adult."¹⁴⁵

7. *New Mexico*

New Mexico's criminal sentencing code contains youthful offender provisions.¹⁴⁶ All juveniles are entitled to a jury trial under New Mexico law.¹⁴⁷ A child must meet the statutory definition of a youthful offender in order to receive the adult sentence.¹⁴⁸ A youthful offender is fourteen- to eighteen-years-old, is adjudicated of a specific crime, and has had three separate felony adjudications within the three-year period immediately preceding the offense.¹⁴⁹ If the juvenile meets these statutory factors, the

¹⁴² *Id.*

¹⁴³ MON. CODE ANN. § 41-5-1601-07 (2009).

¹⁴⁴ Application of Banschbach, 323 P.2d 1112, 1113 (Mont. 1958); *see also* Szymanski, *supra* note 96, at No. 2.

¹⁴⁵ MON. CODE ANN. § 41-5-1604(1)(a)(i)-(ii) (2009).

¹⁴⁶ New Mexico's serious youthful offender provisions, N.M. STAT. ANN. § 31-18-15.3., 32A-2-3.H (West 2009), are technically transfer provisions, rather than blended sentencing statutes. A serious youthful offender narrowly refers to an individual between fifteen and eighteen who is charged with first degree murder and "bound over" to the adult system. SYOs are not considered juvenile delinquents. N.M. STAT. ANN. § 32A-2-3.H.

¹⁴⁷ State v. Eric M., 925 P.2d 1198 (N.M. 1996); *see also* Szymanski, *supra* note 96, No. 2.

¹⁴⁸ State v. Gonzales, 24 P.3d 776, 785 (N.M. 2001).

¹⁴⁹ N.M. STAT. ANN. § 32A-2-3.J(2) (West 2009). Offenses eligible for youthful offender dispositions are second degree murder, assault with intent to commit a violent felony, kidnapping, aggravated battery, "drive-by" shootings, use of explosive, criminal

court makes a finding based on the amenability of the juvenile to treatment and balances that finding against the statutory factors.¹⁵⁰ The court must make the finding that the child is not amenable to treatment or eligible for placement in a mental health facility or institution for children with developmental disabilities.¹⁵¹

Once the court makes the discretionary findings regarding amenability, the juvenile may receive either a juvenile or adult sentence from the juvenile court judge.¹⁵² If the court invokes an adult sentence, the child is immediately incarcerated in an adult facility.¹⁵³

A recent New Mexico Court of Appeals decision applied an *Apprendi* and *Blakely* analysis to the amenability procedures authorized by the state's youthful offender provisions.¹⁵⁴ Forming a new legal rule with full awareness of its ramifications, the appellate court held that there must be a jury determination of the facts needed to impose an adult sentence on a child. As a result, the court held that the provisions which provide for a judge's determination of the facts necessary to impose an adult sentence on a child are unconstitutional. New Mexico's application of *Blakely* and *Apprendi* analyses to amenability hearings is discussed further *infra* Part V.C.

8. Rhode Island

Rhode Island uses a certification process to impose blended sentences.¹⁵⁵ The family court considers certification for "alternative proceedings," that is, blended sentencing proceedings, for any waiver petition.¹⁵⁶ The family court must find both probable cause and the unlikelihood of rehabilitation during a juvenile term.¹⁵⁷ After this certification, the juvenile stays in family court and is given the right to a jury.¹⁵⁸

sexual penetration, robbery, aggravated burglary, aggravated arson, or abuse of a child. *Id.* §§ 32A-2-3.J(1)(a)-(m).

¹⁵⁰ *Gonzales*, 24 P.3d at 788.

¹⁵¹ N.M. STAT. ANN., § 32A-2-20B (West 2009). The judge must also take into account other relevant factors (seriousness, prior sentences, etc.) similar to other states' EJJ provisions. *Id.* § 32A-2-20C(1)-(8).

¹⁵² *Id.* § 32A-2-20A.

¹⁵³ *Id.* § 32A-2-20E.

¹⁵⁴ *State v. Rudy B.*, 216 P.3d 810 (N.M. Ct. App. 2009).

¹⁵⁵ R.I. GEN. LAWS § 14-1-7.2(a)(2) (2009).

¹⁵⁶ *Id.* § 14-1-7(e). Qualifying juveniles are any minors charged with an offense punishable by life imprisonment if committed by an adult, or any minor charged with a felony. *Id.* § 14-1-7(a)-(c).

¹⁵⁷ *Id.* § 14-1-7.2(a).

¹⁵⁸ *Id.* § 14-1-7.3(a).

Upon conviction, the juvenile may be sentenced to training school until age nineteen, or to a prison sentence extending beyond age nineteen, with the juvenile portion of the sentence served in training school.¹⁵⁹ The court must hold a review hearing when the juvenile turns eighteen.¹⁶⁰ At the review hearing, the court may suspend the remaining sentence.¹⁶¹ If the court finds the juvenile has not made sufficient efforts to be rehabilitated, the court may remand the juvenile back to training school or invoke the adult sentence immediately and commit him or her to the Department of Corrections.¹⁶²

C. Other Blended Sentencing Schemes

Three states—Illinois, Vermont, and Ohio—have blended sentencing schemes that do not fit neatly into either the mandatory or discretionary categories. Each of these states' systems is discussed below.

1. Illinois: Discretionary, but Moving Toward Mandatory

Illinois's extended jurisdiction juvenile prosecution has been challenged by litigation multiple times, but it remains an active component of the state's juvenile justice system. The prosecutor may file a petition to designate the proceeding as an extended jurisdiction juvenile prosecution at any time before the minor's adjudication begins.¹⁶³ The only prerequisites to filing the petition are the minor must be at least thirteen-years-old, and the alleged offense must have been a felony if committed by an adult.¹⁶⁴

In response to the petition, the judge must determine probable cause exists.¹⁶⁵ If the judge finds probable cause, there is a rebuttable presumption that the proceeding is designated as an EJJ prosecution.¹⁶⁶ The Illinois statute lists several factors which the judge should evaluate when taking into consideration the appropriateness of the EJJ designation.¹⁶⁷ Those factors include the age of the minor, the minor's history of delinquency, as well as

¹⁵⁹ *Id.* § 14-1-7.3(a)(1)–(2).

¹⁶⁰ PATRICK GRIFFIN, NAT'L CTR. FOR JUV. JUST., STATE JUVENILE JUSTICE PROFILES: RHODE ISLAND TRANSFER PROVISIONS, <http://www.ncjj.org/stateprofiles/asp/transfer.asp?topic=Transfer&state=%2Fstateprofiles%2Fprofiles%2FRI06.asp>.

¹⁶¹ *Id.*

¹⁶² R.I. GEN. LAWS § 14-1-7.3(d) (2009).

¹⁶³ 705 ILL. COMP. STAT. ANN. 405/5-810(1)(a) (West 2009).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* 405/5-810(1)(b).

abuse or neglect, mental and physical health, educational background, and the circumstances surrounding the offense, such as seriousness, aggression, premeditation, use of a weapon, and bodily harm caused to the victim.¹⁶⁸ The judge must also consider whether the youth will benefit from treatment in the juvenile justice system and whether the security of the public requires sentencing under the Illinois Code of Corrections.¹⁶⁹

The dispositive determination in Illinois's EJJ prosecution is the finding of probable cause by the juvenile judge. When the judge finds probable cause, the EJJ designation becomes a rebuttable presumption.¹⁷⁰ The minor has the right to a jury trial, and trial is open to the public.¹⁷¹ Upon a plea or finding of guilt, the court must impose a juvenile sentence and a stayed adult criminal sentence.¹⁷²

The adult offense is invoked if the juvenile judge finds, by a preponderance of the evidence, that the juvenile committed a violation of the juvenile disposition or a new offense.¹⁷³ If the juvenile sentence is successfully completed, the court vacates the adult criminal sentence.¹⁷⁴

2. Vermont: Criminal Court First

In Vermont, only juveniles who enter guilty pleas in district court may move to have their case transferred to family court for youthful offender proceedings.¹⁷⁵ The district court must find the juvenile amenable to treatment and the public safety not threatened by the transfer.¹⁷⁶ There is no trial at family court because the juvenile has already conditionally pled guilty to the charged offense in criminal court.

¹⁶⁸ *Id.* The court is statutorily required to give greater weight to the seriousness of the alleged offense and the prior record of delinquency than any other factors. *Id.* 405/5-810(1)(b)(v).

¹⁶⁹ 705 ILL. COMP. STAT. ANN. 405/5-810(1)(b)(iv)–(v) (West 2009). The determination of whether the juvenile is a threat to the public security includes examining the minor's history of services, including his or her willingness to participate meaningfully in available services, the reasonable likelihood of rehabilitating in the juvenile system, and the adequacy of services or punishment. *Id.* 405/5-810(1)(b)(v)(A)–(C).

¹⁷⁰ *Id.* 405/5-810(2).

¹⁷¹ *Id.* 405/5-810(3).

¹⁷² *Id.* 405/5-810(4)(i)–(ii). The sentencing hearing is also open to the public. *Id.*

¹⁷³ 705 ILL. COMP. STAT. ANN. 405/5-810(6) (West 2009).

¹⁷⁴ *Id.* 405/5-810(7).

¹⁷⁵ 33 VT. STAT. ANN. tit. 33, § 5281(b) (2009).

¹⁷⁶ *Id.* § 5284(b).

Following the transfer to family court, the minor is given a juvenile disposition.¹⁷⁷ If the youth violates the juvenile probation terms, his status as a youth offender may be revoked, and he is transferred to an adult facility.¹⁷⁸ The Vermont district court determines whether the juvenile's youthful offender status should be revoked, making a discretionary, factual finding concerning the "youth's degree of progress toward rehabilitation" before sentencing the youth to serve time in an adult facility.¹⁷⁹ At this point, the Vermont process is vulnerable to constitutional challenges on the basis of *Blakely's* prohibition on judicial fact-finding that enhances a sentence. The district court's "consideration" of the youth's progress is proscribed judicial fact-finding that imposes a sentence greater than the statutory maximum on the youth.

3. Ohio: Mandatory and Discretionary

Ohio's serious youthful offender (SYO) provision is a complex blended sentencing scheme which provides mechanisms for both mandatory and discretionary blended sentences.¹⁸⁰ The two mandatory SYO categories are fourteen- and fifteen-year-olds adjudicated for murder, aggravated murder, attempted murder, or attempted aggravated murder,¹⁸¹ and sixteen- and seventeen-year-olds either previously committed to the Department of Youth Services or currently charged with an offense involving a firearm.¹⁸² If a juvenile meets the statutory criteria of a mandatory SYO, the judge must impose both the juvenile term and the stayed adult term upon a plea or finding of guilt.¹⁸³

There are ten categories of discretionary SYOs in Ohio, based on a rubric that takes into account the age and offense of the minor. Juveniles as young as ten years old may be adjudicated SYOs. The juvenile has the right to a grand jury indictment to determine probable cause before either a mandatory or discretionary SYO adjudication, as well as the right to a jury trial.¹⁸⁴

After the child is adjudicated under a discretionary SYO provision, the court must make a finding that "given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and

¹⁷⁷ *Id.* § 5284(c)(1).

¹⁷⁸ *Id.* § 5285(c)(3).

¹⁷⁹ *Id.* § 5285(d).

¹⁸⁰ OHIO REV. CODE ANN. § 2152.13 (West 2009).

¹⁸¹ *Id.* § 2152.11(B)(1).

¹⁸² *Id.* § 2152.10(A)(2)(a)–(b).

¹⁸³ *Id.* § 2152.13(D)(1)(a)–(c).

¹⁸⁴ *Id.* § 2152.13(C)(1).

types of programming and resources available in the juvenile system alone are not adequate" to fulfill the goals of the juvenile justice system.¹⁸⁵ Upon that finding, the judge is permitted to impose a juvenile disposition and a stayed adult sentence.¹⁸⁶

V. APPLYING *BLAKELY* TO BLENDED SENTENCING SCHEMES

Applying *Blakely* to blended sentencing schemes must result in a fundamental change in the distribution of fact-finding responsibilities in discretionary blended sentencing schemes. Part A of this section discusses how *Blakely* should apply to discretionary blended sentences. Parts B and C describes two states' treatment of *Blakely* challenges to blended sentencing schemes and amenability determinations and the differing results. Finally, Part D discusses the simple fix for *Blakely* defects in discretionary blended sentencing schemes.

A. How *Blakely* Should Apply to Discretionary Blended Sentences

Because *Blakely* invalidates any judicial fact-finding that enhances a sentence beyond the statutory maximum allowed based on the facts found by the jury or admitted by the defendant, blended sentencing schemes are at risk. The key finding within discretionary blended sentencing schemes is the judicial determination that in the interest of public safety the child should be given an adult sentence, or that the child is unlikely to be rehabilitated by the time he or she turns twenty-one. This finding increases the statutory maximum sentence allowed in juvenile court based on the discretion of one judge. When holding that a judge could not increase a sentence for kidnapping based on the judge's finding of "deliberate cruelty," the *Blakely* decision was clear about judicial discretion in sentencing—it has no place in enhancing sentences beyond the statutory maximum.

Blakely should be applied to juvenile adjudication/sentencing processes in which juveniles face an adult sentence and potentially years in criminal prisons. Due to poor data keeping in the states' departments of youth services and corrections, there is no way of knowing how many juveniles are serving adult sentences pursuant to blended sentences. To have an unknown number of individuals serving criminal sentences as a result of one discretionary finding by a single judge, separate from the jury's findings and the minor's admissions, is unacceptable, constitutionally and practically. If the juvenile system wants to maintain its goal of rehabilitation, the simple finding by one

¹⁸⁵ *Id.* § 2152.13(D)(2)(a)(i).

¹⁸⁶ OHIO REV. CODE ANN. § 2152.13(D)(2)(a)(ii)–(iii) (West 2009).

judge that a child is not amenable to treatment undermines the credibility and the effectiveness of the entire system.¹⁸⁷

B. *Why Ohio Got It Wrong*

Ohio is the one of two states that have considered their blended sentencing schemes in light of *Blakely*. The Ohio Supreme Court's treatment of D.H., a juvenile offender with no prior delinquency adjudications or other outstanding problems who received a blended sentence at the discretion of the juvenile judge, is discussed below.¹⁸⁸ Another appeal to the Ohio Supreme Court by a serious youthful offender is following the January 2009 D.H. decision. T.F.'s challenge to the invocation of his adult sentence has been accepted for review by the court, and is also addressed below.¹⁸⁹

1. *The Ohio Supreme Court's Treatment of Serious Youthful Offenders*

The Ohio Supreme Court dealt with blended sentencing directly in a recent case. In *State v. D.H.*,¹⁹⁰ the court ruled that in cases where a juvenile is eligible for "serious youthful offender" adjudication, the jury must serve the primary fact-finding role. Justice Pfeifer wrote that "[o]nly the jury's factual determination makes the juvenile defendant eligible for disposition that might include a stayed adult sentence."¹⁹¹

¹⁸⁷ This argument is also made against transfer and waiver provisions that move minors to the adult criminal court. There is a debate among scholars as to whether the most serious offenders should be transferred to adult court, or instead should be the focus of juvenile rehabilitation efforts. Compare Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 268 (1991) (stating that "it is inevitable . . . that cases will arise where the minimum punitive response believed necessary by the court and the community exceeds that available to the juvenile court"), with Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 447-48 (arguing that there is a "need to insure that the juvenile court retains jurisdiction over the most serious cases and the most serious offenders . . . [the juvenile] system should not, as a matter of policy, seek to exclude those who most challenge the system's rehabilitative and beneficial aspects").

¹⁸⁸ See *State v. D.H.*, 901 N.E.2d 209 (Ohio 2009); see also *infra* Part V.B.1.

¹⁸⁹ See *In re T.F.*, 02/10/2009 Case Announcements, 2009-Ohio-565; see also *infra* Part V.B.2.

¹⁹⁰ 901 N.E.2d 209 (Ohio 2009).

¹⁹¹ *Id.* at 217. The Court did not address the constitutionality of Ohio Rev. Code Ann. § 2152.14, the portion of the statute that allows the invocation of the adult sentence, in *State v. D.H.* *Id.* at 210.

The case of the minor, D.H., is an example of the type of offense targeted by blended sentencing statutes. D.H. was fifteen-years-old when he was charged with murder and attempted murder.¹⁹² He fired shots into a crowd of people in his neighborhood during a fight outside his friend's home.¹⁹³ D.H.'s friend was involved in the fight occurring in his front yard when D.H. fired the shots into the melee.¹⁹⁴

When D.H. fired the gun into the crowd, a bullet struck and killed his friend's sister.¹⁹⁵ This kind of serious, violent offense committed by an older juvenile would typically be dealt with solely in criminal court. With the age of the offender and the seriousness of the crime, D.H. could have been tried as an adult, facing the serious consequences of serving time in an adult facility. However, since D.H.'s offense was committed in Ohio, he was not transferred to criminal court, nor was he subject only to sentencing within the jurisdiction of the juvenile court. Instead, he was indicted on several serious counts, including murder, attempted murder, and felonious assault; each count alleged that D.H. was subject to serious youthful offender disposition.¹⁹⁶

Because of his age and the nature of the crime, D.H. was eligible for a discretionary blended sentence; the decision to extend his sentence beyond the statutory authority of the juvenile court was left up to a single judge. The juvenile court judge stated the following on the record:

I have the discretion to order a blended sentence on this reckless homicide because a firearm was used and the law requires me to use graduated actions and services to provide for the protection, care and mental and physical development of the child involved in this case. That is just part of the juvenile [serious-youthful-offender] statute. And I need to consider the circumstances and facts, the juvenile's history, the length of time level and juvenile history, and any adult sentence would be stayed or suspended pending any juvenile disposition.¹⁹⁷

The trial level of the proceeding took place in the Franklin County Juvenile Court, with a jury hearing the case and finding the facts. The specially impaneled jury found D.H. not guilty on the counts of murder and attempted murder; however, the jury found him guilty of the lesser offense of

¹⁹² *Id.* at 210.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *D.H.*, 901 N.E.2d at 210. Another person at the fight was shot in the leg, and another later found bullet holes in his clothing. *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 211.

reckless homicide with a firearm specification.¹⁹⁸ D.H. was adjudicated a delinquent minor for committing a third-degree felony.¹⁹⁹

In a discretionary SYO situation like D.H.'s, the stayed adult portion of the sentence may only be imposed if the judge, not the jury, finds that the juvenile disposition alone would be inadequate to meet the "statutorily enunciated purposes of juvenile disposition."²⁰⁰

At D.H.'s sentencing hearing, the juvenile judge, not the jury, made the factual finding that because the crime was serious, resulted in the death of another minor, and involved the use of a gun, the serious youthful offender designation was appropriate.²⁰¹ He also noted that D.H. had no prior juvenile record, no "real problems before this incident."²⁰²

Nevertheless, the juvenile court judge took into account the circumstances, the facts, and the minor's prior history, and the judge found that the serious youthful offender designation was appropriate. He acknowledged that even though D.H. might not serve the adult portion of his sentence, the adult criminal time would be "hanging over his head."²⁰³ The judge felt that this discretionary blended sentence was a deterrent to "any future potential crime" that D.H. might be involved in after his release.²⁰⁴

Giving D.H. a blended sentence rejected a traditional juvenile sentence as insufficient for rehabilitation, and the potential adult sentence was considered necessary to properly punish him for the crime.²⁰⁵ Further, based on the jury's findings, the judge in his discretion imposed a blended sentence that included a term in juvenile commitment lasting until D.H. reaches the age of majority.²⁰⁶ After his twenty-first birthday, D.H. may serve up to three years in adult prison.²⁰⁷ If he successfully completes his juvenile term, that is if D.H. has been successfully "rehabilitated," D.H. will not serve the stayed adult sentence.

¹⁹⁸ *Id.* at 210.

¹⁹⁹ *Id.*

²⁰⁰ *D.H.*, 901 N.E.2d at 213.

²⁰¹ *Id.* at 211.

²⁰² *Id.* D.H. had never been suspended from school, accused of drug or alcohol abuse, or treated for any mental illnesses, according to his school psychologist. The court noted all of these facts before determining that a juvenile, rehabilitative disposition was insufficient. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *D.H.*, 901 N.E.2d at 212-13.

²⁰⁶ *Id.* at 211.

²⁰⁷ *Id.*

On appeal in the Tenth District Court of Appeals in Ohio, D.H.'s attorneys made the argument that D.H.'s sentence to adult prison was unconstitutional. The appeal was based on the Ohio Supreme Court's ruling in *State v. Foster*,²⁰⁸ the state-level companion case to *Blakely*, holding that a criminal defendant's constitutional rights, specifically the right to a trial by jury, included the right to have the jury and not the judge make all factual findings that result in a sentence greater than the statutory maximum.²⁰⁹

The Ohio Court of Appeals upheld D.H.'s blended sentence. The blended sentence and the trial court's serious youthful offender designation were upheld even though the court recognized that its decision was in conflict with a Third District opinion.²¹⁰ Because of the conflict between the districts, the Ohio Supreme Court accepted the conflict for review.²¹¹

In an opinion written by Justice Pfeifer, the Ohio Supreme Court relied on the United States Supreme Court's decision in *McKeiver v. Pennsylvania*,²¹² along with Ohio's *In re Agler*.²¹³ Both *McKeiver* and *Agler* held that the fundamental objectives and protections of juvenile proceedings are not identical to the rights of an adult defendant during criminal prosecution, and most significantly, that juveniles do not have the right to a jury to decide their cases.²¹⁴

Justice Pfeifer acknowledged that juveniles faced with a potential serious youthful offender designation are different cases and should be treated

²⁰⁸ 845 N.E.2d 470 (Ohio 2008).

²⁰⁹ In *State v. Foster*, the Ohio Supreme Court found two Ohio statutes, Ohio Rev. Code Ann. §§ 2929.14(E)(4) and 2929.41(A), unconstitutional because they required judicial findings of fact before a sentence greater than the statutory maximum sentence authorized by the jury verdict or by admission of the defendant could be imposed. *Foster*, 845 N.E.2d at 470. The *Foster* decision was based on the *Apprendi* and *Blakely* decisions in the United States Supreme Court.

²¹⁰ *D.H.*, 901 N.E.2d at 211–20.

²¹¹ The Ohio Court of Appeals phrased the conflict in the following certified question:

Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, and as applied to an adult felony sentencing in accordance with *State v. Foster* . . . and *Blakely v. Washington* . . . also apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposed the adult portion of a blended juvenile/adult sentence under R.C. 2152.13 of Ohio's serious youthful offender statutes?

Id. at 212.

²¹² *Id.* at 215.

²¹³ *Id.*

²¹⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 553 (1971); *In re Agler*, 249 N.E.2d 808, 816 (Ohio 1969).

differently than typical delinquency cases.²¹⁵ Serious youthful offenders are entitled to a jury under the statute.²¹⁶ Nevertheless, the spirit of the idealized juvenile court, the “kinder, gentler” nature of the juvenile court, and the *parens patriae* role of the state colored the Court’s decision.²¹⁷

The court ultimately determined that the statutory scheme struck a constitutional “balance” between the right of a juvenile charged as a serious youthful offender to have the facts found by a jury, and the authority and discretion of the juvenile court judge to impose a blended sentence.²¹⁸ The court felt that Ohio’s serious youthful offender laws balance the due process rights of juvenile criminal defendants with the state’s public policy interests in rehabilitating delinquent children.²¹⁹

According to Justice Pfeifer’s opinion, “[o]nly the jury’s factual determination makes the juvenile defendant *eligible* for a disposition that might include a stayed adult sentence.”²²⁰ The jury is involved in the adjudicative process, and because of that limited involvement, the judge as the sole decision-maker in the *dispositional* portion of the process does not violate the juvenile’s due process in the view of the Ohio Supreme Court.²²¹

The Ohio Supreme Court also relied on the fact that the statutory scheme includes several factors that must be considered before a blended sentence is given.²²² The factors in Ohio’s blended sentencing statute require the judge to assess the strengths and weaknesses of the juvenile justice system and the modes of rehabilitation available in relation to the particular minor at hand.²²³ The system trusts the judge to have the expertise to determine the system’s ability to address the needs of the child, and the minor’s ability to be rehabilitated in the specific situation.

The “kinder, gentler” judge, armed with the flexibility and familiarity that define juvenile courts, has the authority to impose a sentence that is a “blend” of juvenile incarceration and conditional incarceration in an adult facility, according to the Ohio court.²²⁴ Because the adult sentence is not

²¹⁵ *D.H.*, 209 N.E.2d at 216.

²¹⁶ *Id.* at 217.

²¹⁷ *Id.* at 216.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 217 (emphasis added).

²²¹ *D.H.*, 901 N.E.2d at 217.

²²² *Id.*

²²³ OHIO REV. CODE ANN. § 2152.13(D)(2)(a)(i) (West 2009); *see also supra* Part IV.C.3.

²²⁴ *See D.H.*, 901 N.E.2d at 218 (holding that “due process does not require a jury determination on the imposition of a serious-youthful-offender dispositional sentence

imposed immediately and the juvenile has an opportunity to redeem him- or herself, the court found that leaving the determination of a serious youthful offender's blended sentence "to an expert . . . does not offend fundamental fairness."²²⁵

In *D.H.*, the Ohio Supreme Court determined that the Ohio blended sentencing scheme gives minors charged as serious youthful offenders the right to have their guilt or innocence determined by a jury, but that right does not extend to the fact-finding that allows the imposition of a stayed adult sentence. *D.H.* holds that the Ohio statute grants juvenile judges the discretion and authority to impose an appropriate sentence of either juvenile disposition or combined juvenile and adult sentences.²²⁶ Based on the limited nature of a minor's right to a jury, Justice Pfeifer found Ohio's statutory scheme constitutional.²²⁷ The court held that blended sentences supported by the factual findings of a jury and *additional* findings made by a judge balance the due process rights of defendants with the state's interest in rehabilitating delinquent minors.²²⁸

Sidestepping the *Blakely* issue in part, the Ohio Supreme Court decided the case on *McKeiver* grounds, finding the minor's right to a jury was satisfied, but without specifically finding anything about the right of a minor to have the jury make the factual finding that enhances the sentence beyond a juvenile life term, the statutory maximum in juvenile court. Had the court properly applied *Blakely*, *D.H.*'s adult sentence could not have survived the constitutional challenge.

under R.C. 2152.13, including the determination of the stayed, adult portion of the sentence").

²²⁵ *Id.* at 217. Justice Pfeifer also found the constitutional test of fundamental fairness and due process satisfied in Ohio's blended sentencing scheme. *Id.* at 218.

²²⁶ Sentencing Law and Policy, Notable Ohio Supreme Court ruling on constitutionality of "blended" juve[nile] sentences, http://sentencing.typepad.com/sentencing_law_and_policy/blakely_in_the_states/ (Jan. 8, 2009).

²²⁷ *D.H.*, 901 N.E.2d at 218.

²²⁸ *Id.* On the day the *D.H.* opinion was released, Professor Douglas Berman stated, "Because Ohio's 'blended' sentencing law is a unique creation, I am not sure this case had broad enough appeal to garner Supreme Court attention if *D.H.* were to appeal. Nevertheless, these are really interesting constitutional issues that ought to interest not only sentencing fans, but also anyone concerned about juvenile justice." Sentencing Law and Policy, *supra* note 226.

2. *Still Unresolved: Serious Youthful Offenders Back in the Ohio Supreme Court*

Since issuing its decision in *D.H.*, the Supreme Court of Ohio, has decided to hear a successor case, *In re T.F.*²²⁹ Juvenile offender T.F. was seventeen-years-old at the time the delinquent acts were committed, offenses that if he had been tried as an adult would have involved several serious charges, most with firearm specifications.²³⁰ Unlike D.H., T.F. was given a serious youthful offender designation and a blended sentence as part of a plea bargain.²³¹

Having held in *D.H.* that the lack of a jury finding in the course of sentencing a serious youthful offender to a blended sentence is constitutional, *T.F.* reintroduces the question in terms of the invocation of the adult portion of the sentence.²³² On appeal from invocation of the thirteen-year adult sentence, T.F. argued that the State had not satisfied its burden of proof.²³³ T.F. alleged that the trial court abused its discretion in the invocation of the adult sentence, and that the simple finding that T.F. had “demonstrated an unwillingness to become rehabilitated” was insufficient to support the serious youthful offender invocation.²³⁴

T.F. provides the Ohio Supreme Court with an interesting opportunity in the realm of blended sentencing and *Blakely*. The specific issue in *T.F.* is the constitutionality of the Ohio Legislature’s mandate that the trial court find certain facts by clear and convincing evidence prior to invoking the adult sentence pursuant to a blended sentence.²³⁵

²²⁹ No. 23979, 2008 WL 2514056 (Ohio 9th Dist. Ct. App. June 25, 2008); *In re T.F.*, 2/10/2009 Case Announcements, 2009-Ohio-565 (granting cert.).

²³⁰ 2008-Ohio-3106 at *1–2. In criminal court, T.F. could have been charged with involuntary manslaughter, felonious assault, participation in a criminal gang, and aggravated riot. *Id.*

²³¹ *Id.* at *1. T.F. was kept in the juvenile court as a result of the plea bargain. He was given one-and-one-half years in the juvenile system, at the Marion Regional Juvenile Detention Center, and thirteen years incarceration in an adult facility. *Id.* at *1–2.

²³² *Id.* at *4–5.

²³³ *Id.* at *3.

²³⁴ *Id.* The trial court based its findings of “unwillingness to be rehabilitated” on two instances. First, T.F.’s refusal to testify against others in court—an offense equivalent to a misdemeanor in juvenile court—was considered an expression of his belief that he was “above the law” and an example of his unwillingness to rehabilitate. 2008-Ohio-3106, at *7. Secondly, his violent behavior while in the Marion facility was used as proof that he was still involved in gang and rioting activity, and because of this involvement, he was unable to be rehabilitated in the juvenile system. *Id.* at *9–10.

²³⁵ 2008-Ohio-3106 at *8.

The appeal to the Ohio Supreme Court in *T.F.* forces the holdings in *Foster* and *Blakely* once more into the juvenile legal world. The prohibition on judicial fact-finding as a violation of the Sixth Amendment right to a jury trial must be dealt with directly in the hybrid blended sentence creation.²³⁶ The appellate court deciding *T.F.* relied heavily on the overarching ideals of the Ohio juvenile delinquency and blended sentencing statutes. The court, quoting previous Ohio decisions, stated that "[w]hile the objective of the juvenile system is rehabilitation rather than punishment, '[t]he juvenile justice system, together with its rehabilitative objective, is purely a statutory creation and it may contain punitive elements.'"²³⁷ To the appellate court, this justified the invocation of T.F.'s adult sentence, and effectively relieved the Department of Youth Services and the juvenile court system of its statutory obligation to rehabilitate a certain youthful offender. The court reiterated the fact that juvenile proceedings are not criminal proceedings, and thus any rights stemming from the Sixth Amendment are inapplicable to juvenile proceedings.²³⁸

By granting the petition for certiorari in *In re T.F.*, the Ohio Supreme Court has recognized that a conflict remains imbedded in Ohio's serious youthful offender statutes. Simply relying on the absence of a Sixth Amendment jury trial right in juvenile court will not satisfy the *Blakely* inquiry into blended sentencing schemes, in which the juvenile court serves the role of the criminal court in some capacity. The court will have an opportunity to reconsider the rights of juveniles faced with years in adult prison at the discretion of a single juvenile court judge.

²³⁶ *Id.* The Ohio appellate court in *T.F.* noted the differences between the issue addressed in *T.F.* and blended sentencing issues settled in other state decisions. The appellate court distinguished *T.F.* from *D.H.*, which held that findings pursuant to Ohio's blended sentencing scheme "do not violate a juvenile's jury-trial rights in contravention of *Blakely* and *Foster* because neither the United States nor the Ohio Constitution provides a right to a jury trial in juvenile-delinquency proceedings and because juvenile proceedings and laws are rehabilitation-focused." *Id.* at *8 (emphasis added). The court also distinguished *T.F.* from an earlier appellate decision, *In re Sturm*, 2006-Ohio-7101, which held that since the juvenile defendant was subject to Ohio's serious youthful offender designation as a necessary consequence of a finding of murder, "the range of his potential punishment included the applicable adult punishment as part of a blended sentence under OHIO REV. CODE ANN. § 2152.13, thus allowing a trial court to take into account the nature and circumstances of the offense in deciding the punishment within that prescribed range." 2008-Ohio-3106 at *9.

²³⁷ *Id.* at *4 (citing *State v. Matha*, 669 N.E.2d 504, 507 (Ohio 9th Ct. App. 1995), quoting *In re Woodson*, 649 N.E.2d 320, 322 (Ohio 10th Ct. App. 1994)).

²³⁸ 2008-Ohio-3106 at *9.

C. New Mexico Gets It Right: Amenability Hearings Unconstitutional

The New Mexico Court of Appeals recently decided a significant issue in juvenile sentencing. *State v. Rudy B.* held that *Apprendi* and *Blakely* analysis should be applied to amenability proceedings under New Mexico's juvenile offender disposition statutes.²³⁹ The court held that *Blakely* demands a *jury determination* of all facts needed to impose an adult sentence on a child, including a finding regarding amenability to treatment, because "amenability findings are similar to aggravating factors and, as such, are within the jury's exclusive province."²⁴⁰ Using the *Blakely* definition of "statutory maximum," the court found that the baseline sentence for a juvenile is defined in the Delinquency Act and not the state's criminal code, and so imposing an adult sentence exceeds the "statutory maximum."²⁴¹ Further, the arguments made by the state that amenability findings are unsuitable for a jury determination because they involve culpability and predictive elements failed, and the court held that a finding regarding amenability is an aggravating factor that enhances a statutory maximum.²⁴² The New Mexico provision that allowed a judge to determine whether to impose an adult sentence was found to violate the Sixth Amendment right to a jury trial.

The facts in *Rudy B.* are similar to those in Ohio's *D.H.* case. Rudy B. was involved in a gang fight in a parking lot when he fired shots into the crowd of people.²⁴³ He hit three people, seriously injuring one.²⁴⁴ Rudy B. pleaded to two counts of shooting from a motor vehicle resulting in great bodily harm and two counts of aggravated battery with a deadly weapon under New Mexico's Delinquency Act.²⁴⁵ After the court accepted the plea agreement, a further amenability hearing was held, and the court, not a jury, determined that Rudy B. was not amenable to treatment or rehabilitation in the juvenile justice system.²⁴⁶ Rather than receiving a three-and-one-half year maximum juvenile sentence under the Delinquency Act, Rudy B. was sentenced to twenty-five years in adult prison.²⁴⁷

The New Mexico court clearly and consciously created a new rule, overturning *State v. Gonzalez*, which held that *Apprendi* did not require a

²³⁹ *State v. Rudy B.*, 2009 N.M App. LEXIS 121, *30 (N.M. Ct. App. 2009).

²⁴⁰ *Id.*

²⁴¹ *Id.* at *38.

²⁴² *Id.* at *38-44.

²⁴³ *Id.* at *2.

²⁴⁴ *Id.* at *2-3.

²⁴⁵ *Rudy B.*, 2009 N.M App. LEXIS at *3-4.

²⁴⁶ *Id.* at *4-5.

²⁴⁷ *Id.*

jury determination of amenability.²⁴⁸ The previous sentencing procedure required the juvenile court to impose a juvenile or adult sentence after making findings based on evidence presented at an amenability hearing. Now, under the rule established in *Rudy B.*, sentencing must be based on specific findings made by a jury, and cannot depend on the discretion of a single judge during a post-guilt amenability hearing.

*D. How State Legislatures (or the United States Supreme Court)
Should Fix the Blakely Problem*

There is a straightforward way for states to correct the *Blakely* defect in blended sentencing schemes. Simply, the imposition of an adult sentence should not turn upon any discretionary judicial finding. *Blakely*'s prohibition of judicial discretion in fact-finding invalidate pre- and post-trial findings. If the judge must make a discretionary finding to certify the proceedings as extended juvenile jurisdiction prosecutions or as serious youthful offender proceedings, the blended sentencing system is operating in violation of *Blakely*.

An even clearer *Blakely* violation—when the judge must make a post-jury trial finding that the juvenile will likely not be rehabilitated, or that the public safety demands the imposition of the adult sentence—is also be remedied by a prohibition of judicial fact-finding. The judge should present these questions to the jury, too. Under *Blakely*, judicially-prescribed facts are not viable as an operative part of any proceeding that may result in an enhanced sentence, whether those proceedings are happening in the juvenile or criminal courts.

Legislatures should explicitly define which juvenile offenders are eligible for blended sentencing in the statutes authorizing the schemes. This would eliminate all unconstitutional discretion from the sentencing proceedings, resulting in solely mandatory blended sentencing schemes.²⁴⁹

The second option for states is to place the crucial fact-finding responsibilities in the jury's hands. Minors subject to potential blended sentences have the right to a jury and should be given the full protection of the Sixth Amendment. Extending the role of the jury to include one more finding of fact is neither disruptive nor inconsistent with other accommodations made in juvenile court for all blended sentencing hearings. If a statute does not exclusively define who is eligible for a blended sentence, then the jury should determine the fact that the juvenile will likely not benefit from rehabilitative efforts, or that the public safety requires the imposition of

²⁴⁸ *State v. Gonzalez*, 24 P.3d 776, 785 (2001).

²⁴⁹ See *supra* Part IV.A.

the adult sentence. These findings of fact cannot constitutionally lie within the discretion of the judge.

If states do not move to correct these defects, the *Blakely*-prone United States Supreme Court may take the matter out of their hands.²⁵⁰ Enough states employ these questionable sentencing schemes, and enough juveniles are given unconstitutional adult sentences to merit attention from the Court. Time will tell whether public defenders, state legislatures, or state courts will recognize the error in their blended sentencing schemes and salvage their lawful portions before the Supreme Court may invalidate the schemes in their entirety.

VI. CONCLUSION

The collision of the juvenile and criminal justice systems in blended sentencing schemes forces state legislatures to reiterate the goals and purposes of the juvenile system, to determine if the services provided meet those goals, and if minors are not benefitting from those services, to send them away to adult prisons. This hybrid sentence leaves children's rights suspended between two worlds—juveniles are not afforded the leniency, flexibility, and informality of the juvenile court, nor the full rights and protections of a criminal defendant.

Blended sentencing schemes rightly provide a jury determination of the innocence or guilt of the minor. However, the right to a jury trial must also take into account the Sixth Amendment right and *Blakely* mandate that no sentence may be enhanced beyond the statutory maximum by a judicial finding of fact. Unfortunately, in blended sentencing proceedings, the judge, not the jury, makes the finding that the public safety is at risk or the child is unlikely to benefit from juvenile services; this *fact* extends the sentence beyond the statutory jurisdiction of the juvenile court and judge and violates *Blakely* and the Sixth Amendment right to have a jury find one guilty of all elements of the charged crime.

Blakely must be applied to state blended sentencing schemes. State legislatures should enact statutory conditions that, if met, authorize a mandatory blended sentence. Alternatively, states should require the jury who determines the minor's guilt or innocence also to make the finding that increases the sentence beyond the statutory maximum of a juvenile life term.

Leaving findings that enhance a child's sentence up to the discretion of a single judge is precisely the constitutional violation that was condemned in

²⁵⁰ See *supra* text accompanying notes 80–85. The Supreme Court has entertained several *Blakely* challenges since the *Blakely* decision was handed down in 2004. The *Blakely* issue in blended sentencing schemes and amenability determinations is ripe for resolution.

Blakely. Fortunately, the fix is easy. If legislatures wish to preserve their blended sentencing schemes and continue to use this crossbreed form of trial and sentencing, they must correct this constitutional defect, or the *Blakely*-inclined United States Supreme Court may make the determination for them. If states want to give juveniles criminal sentences, then they must be willing to give them the rights and protections of criminal defendants. One judge's opinion should not send a child to prison.

